VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

RE: Synergy Gas Corporation
RR 2, Box 2260
Bennington, VT 05201
and
Vermont Railway, Inc.
C/O State of Vermont
Agency of Transportation
133 State Street
Montpelier, VT 05633

Land Use Permit
#9A0204-EB
(Revocation)

MEMORANDUM OF DECISION

This Memorandum of Decision pertains to a Motion to Alter (the Motion) filed pursuant to EBR 31(A) by Leicester Emergency Management with regard to the Board's decision Re: Synergy Gas Corporation, #9A0204-EB (Revocation), Findings of Fact, Conclusions of Law, and Order (June 8, 1995) (the Decision). As is explained below, the Board denies the Motion.

I. BACKGROUND AND PROCEDURAL SUMMARY

The Decision contains a detailed summary of the background and procedural history preceding the Board's issuance of the Decision.

Briefly, on February 13, 1992, the District #9 Environmental Commission (the District Commission) issued Land Use Permit #9A0204 (the Permit) and supporting Findings of Fact and Conclusions of Law (the District Commission Decision) to Synergy Gas Corporation (Synergy) and Vermont Railway, Inc. (Vermont Railway).

The Permit authorizes the construction and operation of a propane bulk storage facility consisting of two 30,000 gallon above-ground propane storage tanks and other related improvements on a 2.5 acre tract leased by Synergy from Vermont Railway (the Project).

On June 20, 1994, the Town of Leicester Board of Selectmen (the Town), Leicester Emergency Management (LEM), and Richard Dutil filed a petition (the Petition) pursuant to EBR 38 to revoke the Permit.

After issuance of the Decision, LEM filed the Motion on June 16 and 21, 1995. Acting Chair Gibb issued a memorandum to the parties allowing responses to the Motion to be filed on or before July 12, 1995.

On July 11, 1995, LEM filed a letter in support of its Motion.

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No other party has filed a response to the Motion.

II. EBR 31(A)

EBR 31(A) authorizes parties to file, within 30 days of the date of a decision, such motions to alter as may be "appropriate." The rule provides:

> (A) Motions to alter decisions. A party may file within 30 days from the date of a decision of the board or district commission such motions to alter as may be appropriate with respect to the decision.
>
> The board or district commission shall act upon motions to alter promptly. The running of any applicable time in which to appeal to the board or supreme court shall be terminated by a timely motion filed under this rule. The full time for appeal shall commence to run and is to be computed from issuance of a decision on said motion. It is entirely within the discretion of the board or district commission whether or not to hold a hearing on any motion.
>
> The board or district commission may on its own motion, within 30 days from the date of a decision, issue an altered decision or permit. Alterations by board or district commission motion shall be limited to instances of manifest error, mistakes, and typographical errors and omissions.

The Board has issued several decisions which set out the nature of what is appropriate under EBR 31(A). In general, these decisions indicate that a motion to alter is in the nature of reconsideration and the Board should not be asked to "reconsider" matters it was not asked to consider in the first place. Re: Finard-Zamias Associates, #1R0661-EB, Memorandum of Decision (Jan. 16, 1991). A motion to alter also is to be based on the existing record. Re: Swain Development Corp., #3W0445-2-EB, Memorandum of Decision at 3-4 (Nov. 8, 1990). New hearings are not held and new evidence is not taken. Id. at 4; Re: Berlin Associates, #5W0584-9-EB, Memorandum of Decision at 7 (April 23, 1990).

In addition, new arguments are not acceptable, with the exception of arguing that a permit condition is unnecessary or that improper procedures were used. Finard-Zamias, supra at 2; Berlin Associates, supra at 5. The purpose of the exception is to fairly allow parties to present argument about

matters they could not reasonably have known about before. Thus, if parties were or should have been aware of possible conditions or use of procedures before final decision, they should not wait until after decision to object through a motion to alter.

One reason for these limits on the use of EBR 31(A) is that parties should not be encouraged to use motions to alter to convert Board decisions into "proposed" decisions to which they can later respond. Evidence and argument should be given to the Board before decision so that it is fully informed and can make the best decision, and so that the process is not unnecessarily elongated by motions to alter. As the Board has previously stated:

> [The Board's] interpretation is based on the need to maintain the integrity of the Board's appeal process by ensuring that arguments and evidence are introduced prior to final decision.

Finard-Zamias, supra at 2.

III. DECISION

The Motion contends that the Decision should be altered with respect to whether Synergy willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with the application for the Permit with regard to Criterion (10), and that accurate and complete information may have caused the District Commission to deny the Permit or to require additional or different conditions. In particular, the Motion contends that District Commission Exhibit #28 contains inaccurate, erroneous and materially incomplete information and should not be relied upon.

The Motion by LEM seeks, again, to have the Board revoke the Permit because the Town may have improperly issued a zoning permit for the Project. As the Board stated in the Decision:

> The District Commission reviewed the Project pursuant to EBR 51. Under EBR 51, any development may be reviewed as a "Minor Application" if the district commission finds that the project appears to present no significant adverse impact under any of the 10 Act 250 Criteria. In making this finding, the district commission may consider, in part, the extent to which the project has been reviewed by a

> municipality pursuant to a by-law authorized by 24 V.S.A. Chapter 117, in this case, the Town of Leicester zoning ordinance.
>
> Synergy relied upon its zoning permit to answer the questions regarding Criterion 10 on District Commission Exhibit #4. The Town issued Synergy's zoning permit more than one year prior to the filing of Synergy's Act 250 application. In issuing the zoning permit, the Town's zoning administrator concluded that the Project is "[f]ound to meet the official zoning ordinance of the Town of Leicester and is hereby approved. Effective Date 10/7/90." In District Commission Exhibit #28, Synergy further addressed compliance with Criterion 10 by referring to its zoning permit, and the particular requirements which the Project satisfied under the relevant zoning ordinance. Thus, the Town reviewed and approved the Project pursuant to a by-law authorized by 24 V.S.A. Chapter 117 as required under EBR 51. (Emphasis added.)

The Decision does not rely on the substantive accuracy of the information contained in District Commission Exhibit #28. Rather, the Decision relies on District Commission Exhibit #28 only to conclude that the Town did, in fact, review the Project under a by-law authorized by 24 V.S.A. § Chapter 117 as provided for under EBR 51(A)(3).

In addition, the Decision does not determine whether the zoning permit should have been issued in the first instance by the Town. As the Decision stated, the Board and the district commissions do not have the authority to determine the propriety of a zoning permit's issuance. See 24 V.S.A. Chapter 117.

LEM continues to point out provisions of the Town's town plan which may have prohibited the Project. Therefore, LEM contends the Permit should be revoked. However, a revocation petition does not decide whether a project merits a permit under the 10 Act 250 criteria, or whether a permit should have been issued pursuant to EBR 51. The appropriate time for LEM to have raised these issues was during the proceeding before the District Commission. The Board cannot rectify LEM's failure to participate before the District Commission, or the Town's possible improper issuance of a zoning permit, in a revocation petition brought under EBR 38.

Finally, LEM's Motion contends that the Decision means that a town plan is no longer relevant under Criterion 10. The Board disagrees since it concludes that, even after the Vermont Supreme Court's decision In re Frank A. Molsano, Jr., 5 Vt. Law Week 314, 315 (1994), the review of a town plan remains part of the permit application process under Criterion 10. However, such review must occur during the permit application process, is subject to EBR 51(A)(3), and cannot be done in the context of a revocation petition.

IV. ORDER

The Motion is denied.

Dated at Montpelier, Vermont, this 31st day of July, 1995.

ENVIRONMENTAL BOARD

Arthur Gibb, Acting Chair
Samuel Lloyd
Dr. Robert Page
John T. Ewing
Marcy Harding
John M. Farmer

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